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ALASKA BARITE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

PETER G. NASH,
General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
PATRICK HARDIN,
Associate General Counsel,
NORTON J. COME,
Deputy Associate General Counsel,
LINDA SHER,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

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OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. A-1) is not officially reported. The decision and order of the National Labor Relations Board (Pet. App. B1-B2, C1-C39) are reported at 197 NLRB No. 170.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1973. The petition for a writ of certiorari was filed on August 29, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that a non-employee union organizer was entitled to access to company property because, in the circum-

stances of this case, there were no other effective means of communicating with the employees.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act are set forth at Pet. 3-4.

STATEMENT

1. Petitioner operates a facility for mining and processing barite on Castle Island No. 2, a small island off the southeastern coast of Alaska. The nearest sizeable community, Petersburg, is on another small island nearby and has a population of slightly more than 2,000 (Pet. App. C4; Tr. 18, 19, 23-24, 27, 146).[1] There is no regularly scheduled transportation service between Castle Island and Petersburg, but the trip can be made by chartered seaplane or motor launch. A one-way flight normally takes 10 to 20 minutes, and the per person cost is approximately $36, with a lesser cost when more than one paying passenger is carried (Pet. App. C4-C5; Tr. 17-20, 41, 75).[2] Castle Island maintains communications with Petersburg solely through a "ship-to-shore" radio facility, which the Company owns and operates (Pet. App. C5; Tr. 31, 100, 106).

On the Company's property on Castle Island there are, in addition to the various buildings used in its mining and processing operations, sleeping quarters

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[1] "Tr." refers to the transcript of the hearing before the Trial Examiner. A copy has been lodged with this Court.

[2] Most charter planes can seat four or five persons. There is no record evidence as to the availability, cost, or use of motor launches. The trip takes 45 minutes by boat (Pet. App. C4-C5; Tr. 17-19).

for the working crew, a recreation room, a mess hall, and living quarters for the resident manager (Pet. App. C5; Tr. 40). The employees live on the island during their regular five-day work week. About half of the employees are married and maintain homes in Petersburg; they return home on weekends, weather permitting. Those without fixed Petersburg residences may also spend their weekend free time in Petersburg (Pet. App. C5; Tr. 28, 93, 120).

During 1969 and 1970, the Company contracted out its mining operations, using its own employees only for processing. The mining contractors had bargaining agreements with Local 302, International Union of Operating Engineers (Pet. App. C7; Tr. 23-26). During this period, the Union's field representative, Ferral Campbell,[3] visited the Castle Island jobsite several times. No Company official protested or imposed restrictions concerning the frequency, timing, or sites of his visits (Pet. App. C7; Tr. 23-26, 33, 121-122, 124).[4]

In February 1971, Campbell learned that the Company was no longer contracting out its work but had com-

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[3] Campbell has for 19 years been the sole field representative for the Union in Southeastern Alaska. He operates out of the Union's main office in Juneau, Alaska, and periodically visits jobsites—to police contracts and service union members—located in widely-separated localities covering an area of approximately 465 airline miles. This area has no significant highway system and only a limited-schedule ferry system. In his work, Campbell customarily uses scheduled airlines where available, and charter carriers in more isolated community jobsites (Pet. App. C6-C7; Tr. 14-18).

[4] There are no Company rules denying visitors access to the island as such. The manager, Wallace Dolph, has only barred a "boatload of kids" and some "hunters" who had been "drinking." Most visitors arrive unannounced and are prevented only from wandering into the equipment area (Tr. 122-123, 141-143).

menced mining operations on its own and had hired some of the previous contractors' employees. On Sunday, February 28, while visiting Petersburg on business, Campbell secured signed authorization cards from a number of employees (Pet. App. C7-C8; Tr. 29).[5] On March 8, the Union petitioned the Board for a representation election. The Board ordered an election to be held on Friday, June 25, between 3:00 and 4:00 p.m. (Pet. App. C8-C9).

On Tuesday, June 22, Campbell flew to Petersburg and chartered a plane to visit Castle Island during the employees' lunch time. Company Manager Wallace Dolph "affabl[y]" greeted Campbell on the island and invited him to lunch (Pet. App. C9; Tr. 33). Campbell introduced himself to three workers he had not known previously. He ate lunch with the employees, Manager Dolph, and Robert Carnes, the Company's surveyor. Campbell told the employees that he planned to return after work that night and each night thereafter until the day of the election, in order to answer questions about the Union and the benefits of a union shop (Pet. App. C10; Tr. 34), and he told Dolph that he would like to spend a couple of hours per night there, for the next three nights (Pet. App. C10; Tr. 59).

After lunch, Dolph accompanied Campbell on his charter flight back to Petersburg. Dolph told Campbell to "contact" him in town before returning to the island. That evening, Dolph met Campbell at the charter plane service, and told him that, "on the [advice] of our headquarters-counsel, we are not letting you go back on the island"; according to Dolph, prior to the conversation with his attorney, he had had no objection

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[5] There were ten employees in the bargaining unit (Pet. App. C16).

to Campbell's suggested visits to the island as no Company rule would have denied Campbell access (Pet. App. C10-C11; Tr. 34-35, 130, 141-142). Campbell, who was surprised by this announcement, told Dolph that he would fly back to Castle Island and "stand on the floats of the plane and wave," so that the employees would not conclude that the Union had lost interest in their election (Pet. App. C11; Tr. 35-36).

When Dolph and Campbell returned to Castle Island, Dolph agreed to allow Campbell to stand on the island's floating dock,[6] and volunteered to tell the employees of his presence there should any want to talk to him (Pet. App. C11; Tr. 36). Campbell stood on the dock under the plane's wing and signaled to the bunk house 100 yards up the bank. Dolph told the employees Campbell was on the dock. Three employees who were already Union members came down to speak with Campbell. The weather was bad, raining and blowing throughout the five to ten minute visit Campbell had with the employees. The three new workers did not come to the dock. Campbell left some copies of a contract, and requested that it be distributed among the other employees (Pet. App. C12; Tr. 36-38, 64).

The next evening, Wednesday, June 23, Campbell returned and stood on the dock as before. The bad weather continued. The three Union members came down to see him, and told him that the others probably would not "come out in [the] bad weather." One member went to the bunk house to try to get other

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[6] Jutting out from Castle Island is a floating dock constructed of planks laid flat over logs, linked together. The dock, which extends for 250 feet, rises and falls in response to tidal variations, with the entire dock afloat during high tide and only the last few logs water-borne during low tide (Pet. App. C5-C6; Tr. 108-109).

employees to come, but failed (Pet. App. C13; Tr. 38-39). The Union filed formal charges of unfair labor practice on that day.

On Thursday, June 24, Campbell telephoned Perman, a Board field examiner, who was to conduct the election at Castle Island, and reported that the Union had filed unfair labor practice charges against the Company. Perman suggested that Campbell meet his plane in Petersburg the next day, shortly before noon (Pet. App. C13-C14; Tr. 41-43). Meanwhile, Company counsel Loeffler arrived at Castle Island on Thursday. He and Dolph agreed to let Campbell on the island if he appeared, and to let the employees speak with him. They did not, however, call Campbell in Petersburg to tell him that the rule concerning his access had been changed. When Campbell did not show up,[7] it was agreed that he would be invited to lunch on Friday (Pet. App. C14; Tr. 134-135, 150-151).

On Friday morning, June 25, Company management dispatched a radio message to the charter airline service in Petersburg, requesting that the airline call Campbell, on behalf of the Company, and invite him to lunch with the employees, without management present, to discuss the Union. The airline relayed the message to Campbell, who declined the invitation because of his appointment with Perman (Pet. App. C15-C16; Tr. 43-44, 101, 151-152). When Perman arrived, he told Campbell that the Board's Regional Director had decided to go ahead with the election but impound the ballots. The two men went to the island, the election was held, and the ballots were impounded pending the outcome of the present unfair labor practice case (Pet. App. C16; Tr. 44-45).

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[7] Campbell did not go to the island Thursday night because he considered a further visit to be futile in view of the Company's position (Pet. App. C14; Tr. 76).

2. The Board held that the Company violated Section 8(a)(1) of the Act by refusing Campbell access to Castle Island for the purpose of soliciting the employees, during their free time, to join the Union and to support it in the scheduled Board election (Pet. App. C32-C33, C34). In so concluding, the Board, upholding its Trial Examiner, found that the location of the Company's Castle Island facility and the time the employees spent there placed them beyond the reach of reasonable Union efforts to communicate with them elsewhere (Pet. App. C16-C32). As the Board stated, "travel [by the Company's workers] into town, though feasible, clearly requires something more than a negligible expenditure of time and money; the likelihood that—with respect to any given date—the * * * Union's representative would find a significant number of [the Company's] workers 'accessible' without personally visiting their Castle Island camp merits characterization as minimal" (Pet. App. C19).

The Board ordered the Company to allow the Union access to Castle Island in order to communicate with the employees during their free time, "subject only to reasonable regulations concerned with the timing and frequency of such visits" (Pet. App. C35). The court of appeals, concluding that the Board's decision was "justified by the rule announced" in *National Labor Relations Board* v. *Babcock & Wilcox*, 351 U.S. 105, 112-113, enforced its order (Pet. App. A1).

ARGUMENT

In *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 113, this Court stated that, "if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with

them, the employer must allow the union to approach his employees on his property." In *Central Hardware Co.* v. *National Labor Relations Board*, 407 U.S. 539, 548, the Court reaffirmed the *Babcock* test, adding that, where the proper test has been applied, "[t]he determination whether on the record as a whole there is substantial evidence to support agency findings is a matter entrusted primarily to the courts of appeals."

Here, the Board found that the Company's Castle Island facility was a "remote physical situs" (Pet. App. C19) and that the employees were not accessible to the Union representative absent personal visits to Castle Island (Pet. App. C19, C26). The court below correctly concluded that substantial evidence supported the Board's findings, and therefore further review by this Court is not warranted.

Petitioner contends, however, that, under *Babcock*, before the Board can conclude that on-premises contact is necessary, the union must show that every other alternative was tried and failed. The Board believes that this requirement of strict exhaustion puts too narrow an interpretation on *Babcock*; that decision does not require the union to engage in a futile effort where, as here, the objective circumstances make it apparent that other methods of reaching the employees would be inadequate. However, it is unnecessary to resolve that issue here.[8] Until three days before the election, the Company had not barred Union Agent Campbell from its premises and had no general policy restricting public access to the island. Even at that time (June 22),

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[8] The Board's petition for certiorari in *National Labor Relations Board* v. *Tamiment, Inc.*, No. 72-371, certiorari denied, 409 U.S. 1012, presented a similar issue.

the Company initially welcomed Campbell onto the island and gave him every reason to believe that he could return to the island that evening, and each evening thereafter up to the election, to discuss unionism with the employees. Only after conferring with counsel later that day did the Company, for the first time, advise Campbell that he would not be permitted further access to the island. By that time, it was too late for the Union to reach the employees through such other methods of communication as may have existed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
PATRICK HARDIN,
Associate General Counsel,
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